Nos. 87-1729 and 88-454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Petitioner,

v.

PETER MONSANTO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR EUGENE R. ANDERSON, ESQ. AN AMICUS CURIAE IN SUPPORT OF UNITED STATES OF AMERICA

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INTEREST OF THE AMICUS CURIAE

Eugene R. Anderson, Esq., is a lawyer admitted to practice in New York and Massachusetts. He is a member of the Bar of

* Elizabeth I. Hook, a student at Pace University School of Law assisted in the preparation of this brief.

this Court. From 1961 to 1965, he was Assistant United States Attorney for the Southern District of New York, serving as Chief of the Civil Division from 1963 to 1965. Mr. Anderson was amicus curiae in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986). Mr. Anderson has written extensively on the subject of legal fees. See, for example, one *New York Times* article set forth in Appendix A which relates to the subject of these cases.

As a result of his experience in both government and private practice, *amicus* can present a view of the issues in this case that is not presented by either the government, the parties or the other *amici*. Mr. Anderson has carefully reviewed the briefs in these cases filed in the respective Courts of Appeals and believes that the emphasis in this brief on property rights has not been presented to this Court or to the lower courts. This brief argues that the judiciary should not create unprecedented new rights in tainted assets simply because legal fees are involved. The brief also focuses on the public's perception of the legal profession.

SUMMARY OF ARGUMENT

1. Economically successful defendants have no greater constitutional rights than economically unsuccessful defendants. Criminal activity does not vest property rights in those who have wrongfully acquired the property. Forfeiture provisions do not deprive criminal defendants of the use of their legitimate assets to obtain the services of the counsel of their choice. Forfeiture simply prevents defendants from using assets that never belonged to them because the assets were acquired through criminal activity. To exempt legal fees from forfeiture elevates the rights of economically successful RICO and CCE defendants above those of other defendants.

The concept of seizure and forfeiture is well established in the legal system of this country. There are two issues that

distinguish these cases from other seizure and forfeiture cases. First, the statutory provisions involved in these cases strike defendants with substantial tainted assets which can be used to pay legal fees. Second, the victims in RICO cases are so far removed from the defendants as to be easily forgotten in the proceedings.

These cases are actually about property rights and not the rights of accused persons. Establishing an exemption from the forfeiture provisions when legal fees are involved puts the rights of those possessing tainted money and property above the rights of those who have none.

Common law has long established that the fruits of crime do not belong to the criminal. RICO, CCE and CFA did not change the common law; they simply established a mechanism for the disgorgement of illicit fruits. In its opening brief, Petitioner Caplin & Drysdale acknowledges that "nobody" has legal title to the assets. "[N]obody's" assets cannot be used to pay "private" lawyers.

There is no constitutional provision that permits lawyers to share in the ill-gotten gains of criminal defendants they represent. The lawyers in these cases are asking to be lawful beneficiaries of illegal earnings from racketeering enterprises and from organized crime.

2. The Sixth Amendment right to counsel is firmly established. The right to counsel of choice is not absolute. To exercise that right, an individual must have the financial resources with which to do so. Since RICO and CCE defendants have no property rights to the tainted assets, they have no financial resources with which to exercise their right to choice of counsel.

The plight of RICO defendants is being confused with the plight of the lawyers. The problem is lack of legitimate assets. Sympathy for lawyers does not justify special treatment for economically successful RICO defendants.

3. One of the unique features of a RICO case is that there is no victim at the station house. This fact does not call for giving special economic status to the lawyers retained by such defendants. The State of New York has enacted legislation that permits prosecuting attorneys to recover the proceeds of all felonies. If this Court permits lawyers to share in seized assets, it will not only frustrate the will of Congress as expressed in RICO, CCE and CFA, but will also adversely affect the public policy of the State of New York as expressed in its statute.

4. Whether a RICO, or any other, defendant is adequately represented by a public defender or court-appointed lawyer is a separate issue that should be addressed in an *appropriate* case.

5. The public perceives the criminal justice system as being slow, inefficient and favoring the rich and mighty. Vital to a law-abiding society is renewed public confidence in the system.

ARGUMENT

I.

NO PROPERTY RIGHTS ARE VESTED IN CRIMINALS BY CRIMINAL ACTIVITY

Economically successful defendants have no greater constitutional rights than economically unsuccessful defendants. Exempting attorneys' fees from the forfeiture provisions of the Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C §1963 (Supp. IV 1986), Continuing Criminal Enterprise (CCE), 21 U.S.C. §848, and Comprehensive Forfeiture Act (CFA), 21 U.S.C. §853, statutes invests property rights in criminal defendants which these defendants do not have. These cases are about property rights, not the constitutional right to counsel in criminal cases. They are about legal economics, not constitutional rights. At issue is the right of the public to deprive criminals of the fruits of crime, not potential prosecutorial misconduct.

Seizures and forfeitures are ingrained in our laws and, equally important, in our culture.[1] Since the days of our Founding Fathers, the United States Customs Service has impounded alleged contraband. Firearms, alcohol and tobacco, to mention just a few of the multitude of products, have been and regularly are, impounded. The warehouses of the United States Customs Service and the vaults of the New York City Police Property Clerk are full. The United States Attorney for the Southern District of Florida probably has more ships impounded than are in many of the world's navies and enough airplanes to start a medium-sized airline.

Pretrial seizure has been ordinary, usual, well-known and well-accepted for generations — long before enactment of the RICO, CCE and CFA statutes.[2] Two things distinguish RICO, CCE and CFA cases. First, these statutory provisions strike "big guys" who can afford to use ill-gotten assets in their possession to pay legal fees. Note carefully, the plea in these cases is not for a "lawyer," but for a "private" lawyer.[3] Second, the defendants in RICO prosecutions are remote from their victims and from their crimes. There is no battered victim at the station house to demand that her purse or his wallet be returned. The victim is the public; it is wrong implicitly to assume that there is no victim at all, and therefore no compelling government interest.[4]

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[1] Opening brief of Respondent, Monsanto, in No. 88-454 (cited herein as "Monsanto Br."), at p. 12. *Fuentes v. Shevin*, 407 U.S. 67 (1972), changed procedural rules. It did not change property laws.

[2] *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

[3] Brief of Petitioner, Caplin & Drysdale, Chartered, in No. 87-1729 (cited herein as "C&D Br."), at pp. 10, 11, 39, 42, 45; Monsanto Br. pp. 32, 36, 43, 45.

[4] In his opening brief in No. 88-454, Respondent Monsanto distinguishes proceeds of a bank robery from RICO and CCE proceeds. Stating that because the bank and its depositors are "wrongfully deprived owners" having a "common law right to the return of their property," Respondent claims that "the government has a compelling interest in obtaining . . . return [of the assets]

(Footnote continued)

That these cases are about property and not the Constitution is concisely and eloquently set forth in an "Op-Ed" article which appeared in *The New York Times* of December 30, 1988, a copy of which is set forth in Appendix B, to which the Court's attention is respectfully drawn. (*See also* Queenan, *Rico Strikes Again!*, Barron's Nat'l Bus. & Fin. Weekly, Dec. 12, 1988, at 8.) The indifference to the rights of people characterized by this article underscores the fact that these cases are about property rights and not the rights of accused persons. The decision of the en banc panel of the Fourth Circuit implicitly recognized that the most serious pre-trial deprivation of all – deprivation of liberty – is constitutional.[5] The prospect of "private" legal fees – or the loss thereof – does not justify a change of constitutional principles. If these cases were titled *In re Drexel Burnham Lambert & Co.* they would more clearly illustrate the "non-issues."[6]

To establish an exemption from the forfeiture provisions when legal fees are involved puts the interests of those possessing disputed money and property above the rights of those who have none. It is not a deprivation of constitutional rights to prevent a small-time burglar from using the property he allegedly has stolen to

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that plainly outweighs the robber's claim to use. . .[them] for any purpose, even to hire an attorney." Monsanto Br. p. 37. This concession does not square with Monsanto's earlier contention (Monsanto Br. p. 31) that the right to counsel is among the most fundamental of rights. Where is the line drawn between bank robbers and stock manipulators? The right to counsel is not so fundamental that it permits the use of the fruits of crime to pay lawyers. The plea for medical care for the defendants' children (Monsanto Br. p. 17, citing *United States v. Rogers*, 602 F.Supp. 1332, 1348 (D. Colo. 1985)), while touching, fares no better. Stealing for food, shelter, medical care and lawyers is not condoned. The long and short of the matter is that neither Monsanto nor Reckmeyer ever had common law property rights.

[5] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 643 (1988).

[6] Petitioner in No. 87-1729, Caplin & Drysdale, Chartered, seems to acknowledge that the legal fee issue really pinches because of "white collar" crimes. C&D Br. pp. 35, 44, 45.

pay his defense lawyer. A defendant with available funds can use his assets to post bail rather than to pay legal fees. The bail vs. lawyer dilemma is precisely the same issue as that suggested by Petitioner, Caplin & Drysdale, [hereinafter Petitioner] and Respondent, Monsanto, [hereinafter Respondent] in these cases. No one would contend that court-imposed bail deprives a defendant of constitutional rights because he has chosen pre-trial freedom over a higher-priced lawyer. Following their logic, defendants should be permitted to use disputed assets to post bail.

Does an alleged criminal who is caught reaching into the cash register have a constitutional right to take out just enough to pay a lawyer? Should an accused murderer who is the beneficiary of the victim's life insurance policy be able to demand immediate payment of just enough of the insurance proceeds to pay legal fees? Should a defendant be allowed to travel without bail to Switzerland to withdraw funds from a secret bank account if the money is to be used to pay a lawyer? The answer to all these questions, as it is in the instant cases, is no.

The law routinely permits property held by criminal defendants to be frozen. Tax liens and creditors' liens may tie up assets.[7] A wife seeking a divorce may decide that she, not her husband's lawyer, should get the defendant's assets, and, if she can make the required evidentiary showing, can obtain a court order to prevent her husband from disposing of property. Other "[p]urely private predicaments may leave a defendant without the counsel of his choice."[8]

Regardless of how many times it is said that the government is depriving the defendant of the right to pay a lawyer[9] it does

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[7] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 646.

[8] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 645.

[9] C&D Br. pp. 10, 38, 39, 41, 42.

not become true.[10] Defendants who have "undisputed assets" are not deprived of such rights.[11] Defendants with illicit assets do not have any right to those assets and this is not because of anything the government does or does not do. Illicit assets — whether cash or stolen Van Goghs — do not belong to the defendants and cannot be used by defendants. The presence of the government in these cases is irrelevant. The government cannot deprive the defendants of something they do not have. It is not the government that makes a "beggar"[12] of the defendant or renders a defendant "indigent,"[13] it is his or her lack of undisputed assets.[14] This Court should, and must, apply the common law to these cases.[15] RICO, CCE and CFA did not change the common law. As Justice Oliver Wendell Holmes once wrote, "upon this point, a page of history is worth a volume of logic."[16]

Repeated reference to "the defendant's assets" or "his or her assets"[17] *ignores* the facts.

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[10] The potential for prosecutorial misconduct is no more present in these situations than in many others. For example, a prosecutor can grant immunity, decide to indict or not to indict, decide to charge a lesser offense, etc. Even the most aggressive prosecutor cannot pick the lawyer for an indigent defendant nor set the compensation for that lawyer.

[11] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 645, 646.

[12] C&D Br. p. 12, or "pauper" C&D Br. p. 20.

[13] C&D Br. pp. 19, 41; Monsanto Br. pp. 4, 6, 34-35.

[14] The "purely private predicament" of no legitimate assets was not created by the government as contended by Monsanto. Monsanto Br. p. 35, fn. 18.

[15] "Forced indigency" (C&D Br. p. 23) is a terrible thing, but not as reprehensible as living off the fruits of illicit acitvity.

[16] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

[17] C&D Br. pp. 11, 12, 24; Monsanto Br. pp. 3, 6, 11, 36, 38, 41, 48.

Petitioner, Caplin & Drysdale, would have this Court believe that the question is a "fiscal" one.[18] It is not. The fruits of crime do not belong to RICO defendants any more than they belong to muggers, bank robbers or stock manipulators.[19] Whether the government makes or loses money is completely irrelevant.[20] Caught in the dilemma of trying to justify a RICO defendant's use of illicit assets, Petitioner Caplin & Drysdale acknowledges that "nobody" has legal title to the assets. C&D Br. p. 40. *For this reason alone* the Petitioner's sophistry fails. "Nobody's" assets are not the RICO defendants' assets.[21] "Nobody's" assets cannot be used to pay "private" lawyers.[22]

Because the defendants have nothing when they have illicit assets, the argument about equities and "balance of hardships" is a non-starter.[23] Pickpockets do not enjoy such equities and

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[18] C&D Br. p. 28.

[19] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 645. Petitioner in No. 87-1729, Caplin & Drysdale, Chartered, contends that since lawyers have "historically" been permitted to receive tainted assets they should be permitted to continue to do so. C&D Br. p. 45. The argument for the continuation of the practice boils down to "Two Wrongs Make a Right."

[20] Petitioner's concern for the resource needs of "public defenders" (C&D Br. pp. 33-34, 45), while commendable, is a different issue for a different case.

[21] Respondent Monsanto, in No. 88-454, asserts that RICO and CCE defendants have "colorable" title to the questioned assets. Monsanto Br. p 37. But whatever color there is to the title is extinguished when the defendant is convicted. The assets are then not "taken away," but are merely proven not to have belonged to the defendant after all. Preconviction there is, at best, a procedural issue. *Fuentes*, 407 U.S. 67.

[22] Minimizing the government's interests as "merely those of the United States" (*In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 646) does not exalt the defendant's possessory interest to the status of ownership.

[23] C&D Br. p. 15.

neither should RICO defendants.[24] Some lower courts have been drawn into a morass that will involve the courts in hearings akin to matrimonial proceedings to determine the amount of support a spouse and children should receive.[25] Take these cases out of the realm of high finance and the issues vanish. The "hardship" plea is completely devoid of substance because the defendants have absolutely no "right" to use illicit assets for any purpose whatsoever. The entire argument boils down to Willie Sutton's justification for robbing banks: That is where the money is.

Petitioner Caplin & Drysdale confuses the issue by referring to "defendant's vital interests in having food, shelter, medical care and defense counsel pending trial."[26] This argues for a license to steal, which no defendant – no matter how needy – has. The plea for "legitimate living expenses"[27] is nonsense. It is the *source* of the funds, not the *character* of the expenditures, that is in issue.[28] Ivan Boesky's lavish charitable contributions were

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[24] *United States v. Monsanto*, 852 F.2d 1400, 1405 (2d Cir. 1988). The word "may" in Section 853(e)(1)(A) should not be read to permit the courts to give the defendant property rights in illicit assets the defendant would not otherwise have.

[25] *Monsanto*, 852 F.2d at 1408-1409.

[26] C&D Br. pp. 8, 12, 19, 20, 25, 26, 27, 30, 32. If the "food, shelter, medical care" plea was made below it apparently escaped the attention of Judge Wilkinson who wrote "no one would argue that the government must allow a defendant to use contested assets to purchase most categories of consumable services or goods." *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 644.

[27] C&D Br. p. 9; Monsanto p. 21.

[28] Petitioner, Caplin & Drysdale, Chartered, acknowledges that defendants should not be permitted to make "unlawful expenditures." C&D Br. p. 19.

legitimate; his source of funds was illegitimate.[29] The argument is pure nonsense and it ignores the public's interest.[30]

If the courts are permitted to legitimize expenditures of tainted assets, to whom will persons with claims to those assets look if they can establish a "right, title or interest superior" to the defendant?[31] Petitioner, Caplin & Drysdale, and Respondent, Monsanto, are not seeking a narrow statutory construction; they are seeking an unprecedented change in our property laws. The Court should not cleanse tainted assets even though they are going to pay a lawyer. If the courts give "permission" to use assets (Monsanto Br. p. 30, fn. 15) with no provision for "recapture," the courts will both create new property rights where none have heretofore existed and deprive the legitimate owners, if any, of their rights.

There is no constitutional provision permitting lawyers to share in the ill-gotten gains of criminal defendants they represent. In these cases lawyers are asking to be lawful beneficiaries of illegal earnings from racketeering enterprises and from organized crime. No other segment of our society would dare publicly to ask for a share of the "take" from criminal activity.

II.

THESE CASES DO NOT RAISE A SIXTH AMENDMENT ISSUE

The Sixth Amendment right to counsel begins and ends with *Gideon v. Wainwright*, 372 U.S. 335 (1963) and the cases cited in *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 643.

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[29] Judge Winter in *Monsanto*, 852 F.2d at 1408, confused "ordinary lawful expenditures" with the use of fruits of crime.

[30] The plea for just a little bit of the illicit assets (C&D Br.pp. 23-24, 41-42) fares no better. The public has an overwhelming interest in depriving all defendants – RICO defendants and accused bank robbers – of illicit assets. Permitting just a little use of tainted assets puts the courts on a slippery slope.

[31] Monsanto Br. p. 13.

No amount of hair-splitting or searching to see "how many angels can dance on the head of a pin" should be permitted to confuse or obscure the constitutional principle set forth in *Gideon*. Respondent in No. 88-454, Monsanto, concedes that ". . . the right to counsel of choice may not be absolute, and may depend on the financial resources of the individual who seeks to exercise it . . . ." Monsanto Br. p. 32. Since RICO and CCE defendants have no property right to the tainted assets, they are in exactly the same position as defendants who do not have the financial resources to exercise their right to choice of counsel.

Petitioner, Caplin & Drysdale, and Respondent, Monsanto, have made an implicit assumption that the manufactured conundrums in these cases are of someone else's making, e.g. that RICO defendants are innocent bystanders caught between the American Bar Association and the Constitution[32] or that lawyers cannot be bona fide purchasers for value.[33] Lawyers can ethically take credit risks and, in fact, go further sometimes, taking an assignment of bail money thus assuming the risk that the defendant will flee.

The proposed American Bar Association Model Codes of Professional Responsibility and Professional Conduct do not have a constitutional dimension.[34] Petitioner Caplin & Drysdale moves with ease from the proposition that RICO defendants should not be punished to the proposition that lawyers should not be punished. (C&D Br. p. 31; Monsanto Br. p. 23). It is not "punishment" (C&D Br. pp. 25, fn. 13, 40; Monsanto Br. p. 37, fn. 20) to leave a RICO defendant without assets he or she does not legitimately own. There is no issue in the cases about punishment of lawyers; it is a red herring.

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[32] C&D Br. p. 36.

[33] C&D Br. p. 31.

[34] Ethical problems (C&D Br. p. 35) are exacerbated, not solved, by permitting lawyers to be paid from illicit assets.

Having placed RICO defendants in a helpless and hapless situation, their advocates then look to the courts to bail them out. The problem in these cases is no "legitimate assets." The court has already solved that problem as to *all* indigent defendants.

In addition, the plight of RICO defendants is being confused with the plight of the lawyers. Of course, there is sympathy for a lawyer who takes a bum check, but so is there sympathy in that situation for "doctors" and "grocers."[35] Caplin & Drysdale, Chartered, was victimized by Mr. Reckmeyer, who was somewhat aided by their view that an "historic" practice exists permitting criminal defense lawyers to accept tainted assets.[36] Genuine sympathy for victims such as Caplin & Drysdale does not entitle the legal profession to special treatment.

Lawyers are not unique in that they are not bona fide purchasers.[37] Pawnbrokers are similarly situated. The problem is not created by RICO, CCE and CFA, but would exist even without those statutes. It is a problem of no "legitimate assets."[38] It does not justify special treatment for RICO defendants.

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[35] C&D Br. p. 30.

[36] C&D Br. p. 45. Petitioner Caplin & Drysdale argues for a presumption that legal fees in RICO cases are being paid from tainted assets. There should be no such presumption. The statute requires some level of knowledge. It is wrong to say that criminal lawyers can never be paid because of this presumed guilty mind. Petitioner and Respondent are asking this Court to rule that there is no Constitutional way for the Legislature to say that no one can get property rights in tainted assets if the result of such legislative action impacts legal fees.

[37] C&D Br. pp. 31, 34.

[38] *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 645.

III.

THE ABSENCE OF A "SPECIFIC" VICTIM IN RICO CASES SHOULD NOT ACCORD SPECIAL TREATMENT FOR RICO DEFENDANTS

The victims of crimes underlying RICO prosecutions are frequently numerous, unknown, nameless and faceless. The defendants are remote from their crimes physically and temporally. The victim of a street mugging is sufficiently "real" to make it unthinkable that the alleged mugger could use the contents of the victim's wallet to pay a lawyer.[39] A distinguishing feature of RICO is that there is no victim at the station house. This fact does not serve to distinguish RICO defendants from others. It certainly does not call for giving special economic status to the lawyers retained by such defendants.

The State of New York has enacted legislation, N.Y. Civ. Prac. L. & R. Art. 13-A (McKinney Supp. 1989), to permit prosecuting attorneys to recover the proceeds of all felonies. *(See, Kuriansky v. Bed-Stuy Health Care Corp.*, 135 A.D.2d 160, 525 N.Y.S.2d 225 (N.Y.A.D. 2 Dept. 1988), *aff'd*, ____ N.Y.2d ____, ____ N.E.2d ____ (Nov. 22, 1988) where the court allowed the state to freeze defendants' assets alleged to have been obtained through Medicaid fraud; *Morgenthau v. Citisource, Inc.*, 195(85) N.Y.L.J., May 6, 1986, at 13, col. 3T (N.Y. Sup. Ct. May 5, 1986)(not officially reported), *rev'd*, 121 A.D.2d 353, 504 N.Y.S.2d 108 (N.Y.A.D. 1 Dept., 1986), *rev'd*, 68 N.Y.2d 211, 508 N.Y.S.2d 152, 500 N.E.2d 850 (1986), *aff'd on remand*, 128 A.D.2d 459, 513 N.Y.S.2d 429 (N.Y.A.D. 1 Dept., 1987) where the New York County District Attorney was permitted

[39] *See, District Attorney of Queens County v. McAuliffe*, 129 Misc.2d 416, 493 N.Y.S.2d 406 (1985), in which the defendants had extorted $150,000 from an 84-year-old widow. Following arrest, only $85,000 in cash and property remained of the total sum extorted and the court granted a preliminary injunction preventing use of the assets, citing the substantial likelihood that there would be nothing left of the assets to restore to the victim if there was a conviction.

to freeze assets which were alleged to have been obtained through fraud, bribery and corruption upon a showing of a "substantial probability" of successful prosecution.)

A decision by this Court on constitutional grounds permitting lawyers to share in seized assets would not only frustrate the will of Congress as expressed in RICO, CCE and CFA, but also adversely impact the public policy of the State of New York as expressed in its statute.[40]

IV.

THE ADEQUACY OF COURT-APPOINTED COUNSEL TO PROVIDE THE CONSTITUTIONAL GUARANTEE OF A FAIR TRIAL IS A SEPARATE ISSUE THAT SHOULD BE ADDRESSED, IF AT ALL, AS TO ALL INDIGENT DEFENDANTS IN AN APPROPRIATE CASE

Petitioner and Respondent argue that depriving a RICO defendant of the opportunity to retain counsel of his choice with "experience, talent and investigative resources"[41] seriously undermines his ability to defend himself. They do not extend their plea to those RICO defendants who are economically unsuccessful. If representation by a public defender or court-appointed lawyer is inadequate for RICO defendants, that is a separate issue that should be addressed by the Court in an appropriate case. If RICO defendants are entitled to a better defense than presently provided by public defenders,[42] then so too are indigent defendants in other cases.

[40] The State of California has a statute even more similar to the federal statutes, Cal. Health & Safety Code § 11470. In *People v. Superior Court*, 200 Cal. App. 3d 491, 246 Cal. Rptr. 122 (1988), the court upheld the constitutionality of the statute.

[41] C&D Br. p. 11.

[42] C&D Br. p. 44.

Alleged inadequacies of public defenders and court-appointed counsel are not grounds for giving special treatment to defendants who are in possession of substantial amounts of property when arrested.

The adequacy of counsel is not a decision this Court should make in the abstract. There should be no general presumption that *all* public defenders are inadequate. To do so would open the floodgates for appeals alleging inadequate representation by defendants represented by public defenders. The Court should only judge the adequacy of counsel in a case in which an identified client has received or is threatened with receiving inadequate representation.[43]

Petitioner charges that the adversarial process – necessary to prevent abuse by the government – would be seriously threatened by preventing lawyers from taking payments from allegedly illegal assets. The implication is that the adversarial process need not be safeguarded for those who cannot afford high-priced lawyers. These cases are not appropriate cases in which to decide questions related to the adequacy of court-appointed counsel or the "imbalance of powers between the government and criminal defendants."[44]

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[43] The Fourth Circuit noted the fact that "[t]here exist no grounds for a constitutional presumption of incompetence on the part of appointed counsel" (citing *United States v. Cronic*, 466 U.S. 648 (1984)). Rather, the Court suggested that "[i]n a specific case in which a defendant receives ineffective assistance at trial, he can challenge his conviction on that well-established basis" (citing *Cronic, supra; Strickland v. Washington*, 466 U.S. 668 (1984)). *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 647. Neither party has done so here. While Respondent Monsanto in No. 88-454 moved for a mistrial in his criminal trial, that motion was based upon the ruling by the Second Circuit "that he had been deprived of his right to retain private counsel out of the assets restrained by the government (Tr. 14224-44)." Monsanto Br. p. 10.

[44] C&D Br. p. 43.

V.

LAWYERS SHOULD NOT BE PRINCIPAL AND LAWFUL BENEFICIARIES OF ILLEGAL GAIN FROM RACKETEERING ENTERPRISES AND FROM ORGANIZED CRIME

The criminal justice system is in a sorry state. The public perceives it as being slow, inefficient and favoring the rich and mighty. Vital to a law-abiding society is renewed public confidence in the system.

If lawyers are widely perceived to be partners in crime with those they are defending, the system will be even further corrupted. The Fourth Circuit recognized this, stating in its *en banc* opinion that "[p]ublic confidence in the administration of justice might be a casualty of exempting attorneys' fees from forfeiture. Public cynicism and distrust of the legal system might grow as citizens watch huge sums of cash being seized in drug raids and then flowing straight into the pockets of lawyers under a claim of constitutional special privilege." *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d at 649.

From a public policy standpoint, the public must be convinced that the system is fair and applies equally to all citizens. Lawyers, officers of the court, must be seen to be supporting the administration of justice. The profession should not be perceived as pleading for special treatment for a very narrow class of defendants; a class distinguished from other defendants solely because it has the capacity to use allegedly tainted assets to pay substantial legal fees.

If the public sees special treatment accorded not only to the wealthy, but also to those involved in organized crime activities, it will lose its already shaky confidence in the American criminal justice system.

CONCLUSION

In No. 87-1729, *Caplin & Drysdale, Chartered*, the decision of the Court of Appeals for the Fourth Circuit *en banc* should be affirmed.

In No. 88-454, *Peter Monsanto*, the decision of the Court of Appeals for the Second Circuit *en banc* should be reversed.

Respectfully submitted,

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February 22, 1989

APPENDIX A

APPENDIX A

Title: Use Tainted Cash to Pay Lawyers?

Author: Eugene R. Anderson

Publication: The New York Times

Date: Tuesday, March 8, 1988

Page: A31

No constitutional provision permits lawyers to share in the ill-gotten gains of the criminal defendants they represent. That simple, straight forward proposition should be self-evident.

Yet many defense lawyers and even bar associations, including the Association of the Bar of the City of New York, have asserted that prosecutors and courts should not be able to use two Federal laws, the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Forfeiture Act of 1984, to freeze a defendant's assets that may have been received illegally. The reason: Defense lawyers want to make first claims on the money to pay their fees.

Moreover, these lawyers say that the constitutional right of every defendant to a lawyer is jeopardized if the Government can freeze allegedly tainted assets. This line of reasoning is a red herring. It is not necessary to use ill-gotten gains to pay lawyers. The right to counsel is a firmly imbedded constitutional principle. Wealthy defendants are entitled to a lawyer—but no better or wiser a lawyer than the penniless are entitled to.

The real issue is the extent to which lawyers can be principal and lawful beneficiaries of illegal earnings from racketeering enterprises and from organized crime.

No other segment of our society would dare to ask publicly for a share of the take from criminal activity. Some defense lawyers, by arguing that they should be paid up front from the allegedly tainted sums, shame the legal profession. They don't want to take the credit risk that their client might not be able to pay them if the client's money is found to have been gotten illegally.

Defense lawyers cannot ethically take cases on a contingent fee basis, but they can take credit risks. Other lawyers, who bring class actions in securities cases and those who take on personal injury cases on a contingent fee basis, are prepared to take the risk of losing millions of dollars on meritorious but ultimately unsuccessful civil cases. In other professions, businessman also take credit risks. It is not unconstitutional to ask criminal defense lawyers to live by the same rules that apply to others.

Freezing a criminal defendant's assets is not a new legal concept. A wife seeking a divorce may decide that she, not her husband's lawyers, should get the defendant's assets, and, hence, obtains a court order preventing her husband from disposing of those assets. For years, the Internal Revenue Service has had the power to stop a defendant from transferring his assets. A defendant could decide to use his assets to post bail rather than to pay legal fees, and no one would suggest that court-imposed bail deprives a defendant of constitutional rights.

Does an alleged criminal who is caught reaching into the cash register have a constitutional right to go ahead and take out just enough to pay a lawyer? Should an accused murderer who is the beneficiary of the victim's life insurance be able to demand immediate payment of the insurance policy to pay legal fees? Should a defendant be allowed to travel without bail to Switzerland to withdraw funds from a secret bank account to pay a lawyer? Should a defendant be allowed to use the courts to sue others in the criminal enterprise who owe him money if the illicit proceeds will go to pay a lawyer?

Fortunately for criminal lawyers, the courts in the United States Court of Appeals for the Second Circuit have permitted the defendant to dip into allegedly tainted funds, but only to the extent of the regular fees established for lawyers who represent indigent defendants. Those fees satisfy our constitutional mandate.

Wealthy defendants do not merit special constitutional protection and neither do economically successful criminals. If court-appointed counsel is not sufficient to provide the constitutional guarantee of a fair trial, then that problem should be addressed. But we don't solve that problem by giving special treatment to defendants who, through illegal means, have gotten their hands on a lot of money.

The criminal justice system is in a sorry state. But if criminal defense lawyers are widely perceived to be partners in crime with those they are defending, then the system will be even further corrupted.

APPENDIX B

APPENDIX B

Title: Drexel: Hanged Without a Trial

Author: Joseph Nocera

Publication: The New York Times

Date: Friday, December 30, 1988

Page: All

You know that old saw about how, as a society, we can't afford to impinge on the constitutional rights of some obvious rat because it could eventually erode the rights of all of us?

How – to cite the most common example – the Government can't censor pornographic magazines because that could be the first step to censoring, say, the *New Yorker*? How our liberties and rights and guarantees as citizens are so fragile that they must be defended at the very fringes of society – at Nazi rallies and mob trials?

Until last week, I never put much stock in that particular saw, seeing it mainly as an example of civil libertarianism gone amok, a Chicken Little theory that denied both reality and common sense.

Then, last week, the giant investment banking firm of Drexel Burnham Lambert settled with the Government on the eve of being indicted. Now everything looks a lot different.

The club the Government used to bludgeon Drexel into submission – causing the firm to ante up to $650 million and plead guilty to six felony counts rather than face indictment – was RICO, the Racketeer Influenced and Corrupt Organization Act.

If "racketeer" conjures up visions of gangsters, if should; although the definition of a racketeer-influenced organization is wonderfully broad, at least from the point of view of an ambitious prosecutor, there is no question that the legislation was intended to put the mob out of business. The argument was made that the Justice Department needed a truly onerous weapon in order to have a chance in the fight against organized crime, and that RICO was that weapon.

How onerous is this law? Extremely. Anyone convicted under the statute faces, in addition to lengthy prison terms, the prospect of triple damages, the forfeiture of all illegal profits (plus interest) and so on. No problem with that, of course; people convicted of serious crimes, whether mobsters or investment bankers, ought to face serious penalties.

No, the problem with RICO is the extraordinary amount of punishment it exacts before anyone is convicted. Merely by bringing the indictment, the Government is allowed to immediately impound all the defendant's significant assets on the grounds that these assets will be turned over to the Government anyway once the guilty verdict is in.

This is an astounding power for prosecutors, for it gives the Government the ability, quite simply, to put a company out of business.

This is not an exaggeration. This past August, the Government brought a RICO indictment against a securities firm called Princeton/Newport Partners. Although prosecutors sought less than $500,000 in illegal profits, they wanted a bond of nearly $24 million! Because, like any securities firm, Princeton/Newport Partners need capital in order to function, the mere fact of the indictment forced it to liquidate.

Remember, now, there has been no trial. Nobody has been found guilty of anything. But the firm is finished, ruined by the financial terms of RICO and the stigma of being labeled a "racketeer."

I do not mean this to be a brief for Drexel. It seems to me quite plausible that the firm committed the crimes it has been accused of. But there is something fundamentally wrong when Drexel's pre-indictment options were either to settle or be put out of business. Getting the chance to fight for its honor in court was never part of the equation. Drexel has already been found guilty—not by a jury but by the United States Attorney.

What is offensive about the law is this: It presumes guilt. In so doing, it violates one of the civil liberties we hold most dear as a society—namely, that we are innocent until proven guilty in a court of law.

RICO makes a mockery of this right. Of course, no one seemed to be bothered by this trampling of basic rights when it was "only" the basic rights of mobsters that were at stake. But now the victims are more "respectable"; consequently, there is growing sentiment that the law should be rewritten by Congress.

Great, except the rewriting the business community has in mind would still allow RICO to trample on the rights of mobsters, while protecting those in the securities industry. One would have hoped that the securities industry would see now that the old saw has some validity after all. First it was mobsters, then securities firms. Who will be next?

Don't rewrite RICO. Abolish it. The Chicken Littles got this one right: When you violate the rights of mobsters, you violate the rights of us all.